Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

ORIGINAL

To: The Commission

COMMENTS OF
CONSORTIUM OF SMALL CABLE SYSTEM OPERATORS

The Consortium of Small Cable System Operators (the "Consortium"),[1] by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its Comments[2] in response to the above-captioned Notice of Proposed Rule Making ("NPRM"), which seeks comment on the implementation of the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act" or "Act").[3]

Section 623 of the Act requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable services and equipment for those systems not subject to effective competition, and procedures for implementation and enforcement of these rules. The Act also requires the Commission to establish criteria for identifying unreasonable rates for cable programming services, and procedures for resolving complaints regarding such services. In addition, the Act requires the Commission to establish rules for determining the reasonable terms and conditions and maximum reasonable rates for leased commercial access.

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[1] Attached hereto as Exhibit 1 is a list of the Consortium's members.

[2] A copy of these Comments is being served on the FCC's new Small Business Office, for consideration pursuant to the Regulatory Flexibility Act.

[3] Pub. L. 102-385, 102 Stat. (1992).

Congress' objective in enacting these provisions was to ensure that subscribers of cable systems not subject to effective competition pay rates comparable to those that would be charged if the system were subject to effective competition.[4] In fashioning new rate regulations consistent with the requirements of the Act, the Commission is charged with reducing the administrative burdens on, among others, cable operators,[5] particularly small system operators.[6] The Act grants the Commission broad discretion to adopt such formulas or other mechanisms and procedures as may be necessary to achieve this Congressional objective.[7]

Small System Operators Should be Exempt from Rate Regulation

Congress' concern that rate regulation would have a disproportionate impact on small system operators, and that such systems require some form of relief from the new requirements if they are to continue in business, is well founded. The Consortium's members, like most small system operators, provide cable services primarily to less affluent, sparsely populated, mostly rural areas. By their very nature, such areas offer a limited profit potential due to the higher per capita cost of service. The small operators problems are further exacerbated because they are not able to take advantage of the volume discounts for equipment and program purchases typically offered large systems and MSOs. In addition, because they serve areas with fewer homes per mile, small systems typically face substantially higher cable hardware and pole attachment costs. This combination of factors requires small system operators to price their services at or even below cost, even in the absence of competition. As a result, small

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[4] Section 623(b)(1); NPRM at 19.

[5] Section 623(b)(2)(A) and (B); NPRM at 19.

[6] Section 623(i) specifically provides that "In developing and prescribing regulations pursuant to this [rate regulation] section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1000 or fewer subscribers.

[7] Section 623(b)(2)(A) and (B).

systems typically operate with slim to non-existent profit margins.[8]

Absent relief, the significant added costs and burdens associated with burdensome rate regulation will eventually force many, if not most, small system operators out of business.[9] Such a restructuring of the industry clearly was not an intended consequence of the new legislation, and runs directly counter to Congress' directive to the FCC to lessen the burden on small system operators and thereby ensure the continued viability of cable service in rural areas. Such a result could also be construed to constitute an unlawful taking under the Fifth Amendment.

Recognizing as much, the Commission, noting that its current rules already provide relief for the small system operator,[10] asks whether it should exempt small systems from any substantive or procedural rate regulation requirements.[11] In this regard, the Commission requests comment on whether it should be presumed that, because of the underlying costs involved and the small base over which these costs can be spread, small systems are "unlikely to be earning returns or charging rates that could effectively be altered

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[8] This in turn places the small system operator at a distinct disadvantage in the commercial lending market. Unable to show the cash flow and profit margins common to MSO operations, small system operators typically find it very difficult to secure adequate financing. The costs and burdens of rate regulation would place on intolerable financial burden an such systems.

[9] This proceeding must not be viewed in isolation. The Act's must carry/retransmission consent, customer service, tier buy-through, EEO and other requirements all impose substantial and costly burdens on small system operators, burdens which they are ill-equipped to handle. It is simply unrealistic to expect small system operators, given their limited staff, resources and profit potential, to be able to continue in business under the combined weight of these myriad requirements, especially onerous rate regulation requirements. What is at stake is the continuation of cable service in this country's rural areas.

[10] Small systems are currently exempt from network nonduplication (47 C.F.R. § 76.95(a)) and syndicated exclusivity requirements (47 C.F.R. § 76.15(a)), the sports black-out rule (47 C.F.R. § 76.67(f)) and certain technical standards and performance testimony requirements (47 C.F.R. § 76.601(e)).

[11] NPRM at 63.

to the benefit of subscribers through detailed regulatory oversight."[12]

The Consortium strongly urges the Commission to exempt small systems from substantive and procedural rate regulation requirements as applied to basic tier services and equipment and cable programming services.[13] Small systems should also be exempt from any associated reporting requirements.[14] As the Commission itself has recognized, "small systems tend to have higher costs and to charge lower rates."[15] This is true regardless of the presence or absence of competition, as the very nature of the markets served by small systems (less affluent, sparsely populated, higher per capita costs, etc.) compels the type of consumer-friendly pricing decisions and reasonable profit margins the Act's rate regulation provisions are designed to ensure.

In the absence of an outright exemption for small systems, the Commission should at the very least adopt a presumption that the

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[12] Id.

[13] For purposes of the exemption, the Consortium would suggest that "small cable system" be defined as an independently-owned system which has either: (a) no more than 10,000 subscribers; or (b) annual gross revenues of $7.5 million or less. A 1000 subscriber limit would fail to include many marginal rural systems. The 10,000 subscriber figure more accurately reflects those systems that would suffer disproportionately and thus would desperately need relief from the added costs and burdens of rate regulation, and is consistent with Congress' broad directive to reduce the regulatory burdens on small systems. The $7,500,000 revenue figure tracks the Small Business Administration's definition of a small enterprise.

[14] Small systems generally do not have the staff personnel (bookkeepers, auditors, attorneys, etc.) an MSO can rely on to meet complex reporting requirements. In order to complete the reporting forms attached as appendices to the NPRM, many small system operators would have to completely revise their accounting systems and hire additional in-house staff or hire outside professionals. This would be prohibitively expensive, would only serve to divert scarce resources from system operations, and would likely force an increase in rates. Thus, small system operators should be exempt from the reporting requirements, whether or not they are also exempt from the substantive requirements of the Act.

[15] NPRM at 63.

rates charged by small systems cannot be effectively altered through rate regulation due to the operational and financial limitations they face. Under this approach, small systems from the outset would be deemed in compliance with the Commission's rate regulation standard. The burden would shift to the franchising authority (or subscriber in the case of cable programming services) to affirmatively demonstrate that a system's rates are unreasonably high.

Although certainly preferable to full-scale rate regulation, the drawback to this approach is that small system operators could be subject to frivolous complaints, and very likely could not bear the expense associated with a complex and costly administrative process to justify their rates.[16] The Commission's suggestion that small system operators be allowed to certify their compliance suffers from the same drawback because certification likely would entail significant administrative costs that small systems are ill-equipped to bear, costs which could actually force the small system operator to increase rates or go out of business.

Congress' concern for the small system operator was well placed. The combined effect of the Act's rate regulation requirements will place the very survival of small systems in question. Absent substantial relief in the form of a small system exemption, relief which the Commission itself recognizes is justified due to the unique characteristics of small system operations, the continued expansion of cable service into less populated areas will be jeopardized, and the viability of existing service in such areas will be seriously threatened. This is not the result intended by Congress and certainly would not serve the public interest.

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[16] Certain of the Consortium's members operate a number of very small systems (in some cases fewer than 200 subscribers) spread over a wide area. These operators simply could not bear the costs or the crushing administrative burdens associated with defending their rates in each of their franchise areas.

The Commission's Rate Regulation Standard Must Account for The Operational and Financial Limitations Faced by Small Systems

To the extent small systems are not exempt or otherwise relieved from the significant burdens of rate regulation, any standard adopted by the Commission must take into account the higher operational costs and lesser profit potential typical of small system operations. The Consortium would urge the Commission to adopt a benchmark standard, adjustable over time, that takes into consideration such variables as the age of a system, number of subscribers, number of channels, homes passed per mile, demographics of market, etc.[17] The Commission's standard must also recognize that general compliance costs will place a disproportionately greater burden on the small system operator, and account for these added costs as well.[18]

Rate increases should be allowed to go into effect automatically upon proper notice, subject to modification if they are ultimately determined to be unjustified. Small system operators should be allowed to pass through, without prior regulatory review or approval, cost increases attributable to increases in taxes, franchise fees, PEG costs, pole rents,

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[17] The FCC's proposal to allow operators to apply for waivers of the Commission's standard based on a cost-of-service showing is ill-conceived. The Commission itself dismisses cost-of-service regulation as too complicated and costly to serve as its primary rate regulation standard. Small system operators, with their limited staffs and resources, could not afford to participate in a waiver process based on a cost-of-service showing. At least in the context of small system operators, it makes no sense to adopt a waiver standard that is more complex and costly to comply with than rate regulation itself.

[18] As noted earlier, small system operators will be forced to hire bookkeepers, auditors, attorneys and other professionals in order to comply with the new regulations. Operating with slim profit margins, such expenditures will have a disproportionately greater impact on the small system operator. In addition, diverting scarce funds to regulatory compliance will, in many cases, leave little or none left over to ensure superior technical operations and customer service, or to accomplish required system upgrades and expansions, programming and service additions, etc.

retransmission consent fees, program costs, etc., because such price changes are beyond the operator's control.[19] Subscribers wishing to challenge an operator's rates should be required to obtain the franchising authority's concurrence as a precondition to the filing of a complaint with the FCC. Moreover, any such complaint must be subject to a very specific prima facie standard. These requirements are necessary to guard against frivolous complaints, and thus ensure that neither cable operators nor the FCC are forced to devote precious time, energy and resources to the consideration of baseless claims.

Certification Should Be a Prerequisite to Rate Regulation

Regardless of the specific standards and procedures adopted by the Commission, certification by a franchising authority must be a prerequisite to basic rate regulation. As the Commission correctly notes, its authority to regulate basic cable service rates is severely limited under the Act.[20] In fact, under the express terms of the statute, the Commission may regulate basic service rates only if it has disallowed or revoked a franchising authority's certification.[21] Thus, unless a franchising authority affirmatively seeks to assert regulatory jurisdiction over basic cable service by the filing of a certification, the Commission has no independent

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[19] Programming costs, among others, have skyrocketed in recent years. The Consortium's members have been forced to cope with price increases of tenfold or more for services such as ESPN since the early to mid-1980s. By contrast, and despite these cost increases, the Consortium's members have raised their rates only marginally, and generally no more than absolutely necessary to remain profitable. For example, Southwest Missouri Cable TV, Inc. ("Southwest Missouri") did not increase its basic rate for six years, despite facing significant increases in programming and other costs (in the last eighteen months alone, Southwest Missouri's program service fees have increased 14.9%). While many operators have felt the sting of program price increases, small operators suffer disproportionately as they generally are forced to pay top dollar for programming and have a smaller subscriber base over which to spread these spiraling costs.

[20] NPRM at 11.

[21] Sections 623(a)(2) and 623(a)(6).

authority to initiate basic service regulation. Any alternative interpretation is inconsistent with the express language of the Act and long-established policy.[22]

The Act requires the Commission to find that a cable system is not subject to effective competition before authorizing basic rate regulation. The Commission proposes that local franchising authorities, as part of the certification process, provide evidence of the lack of effective competition as a "threshold matter of jurisdiction."[23]

Any such determination by a franchising authority should be in writing, and thoroughly detail the precise reasons for the franchising authority's finding of no effective competition. Any data or other information relied upon for this determination should be clearly identified, with copies attached to the certification, and served on the cable operator at the same time it is filed with the FCC. Cable operators must be given the opportunity to oppose or otherwise respond to a franchising authority's initial finding, and have their position considered by the FCC, prior to certification approval and the imposition of rate regulation.[24] Inasmuch as a showing of lack of effective competition is a "threshold matter of jurisdiction," administrative due process

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[22] Rate regulation has always been recognized as an inherently local matter. Just as the Commission has never required franchising authorities to regulate rates where they find such regulation unnecessary or inappropriate (Cable Communications Act Rules, 58 RR2d 1, 35 (1985)), so, too, the Commission should refrain from unilaterally imposing its standards at the local level in the absence of a franchising authority's affirmative act to implement such standards. Even then, under the express terms of the statute, the Commission can initiate basic service rate regulation only if a franchising authority's certification is disallowed or revoked.

[23] NPRM at 13.

[24] The Act provides that a certification will become effective 30 days after filing unless the FCC finds that the franchising authority has not met specified criteria for exercising rate regulation authority. (See Section 623(a)(4). Thus, the Commission will be required to adopt streamlined processes to ensure that all affected parties, and in particular the cable operator, are given an opportunity to participate.

requires that this issue be resolved (after the opportunity for comment by the cable operator) before rate regulation can be implemented.

Conclusion

Small system operators provide a vital service, delivering cable to less affluent, sparsely populated, more rural areas, typically at marginal profit levels. Complying with the Act's rate regulation requirements will pose an insurmountable burden for the small system operator, a burden that likely will force many of them out of business. In their absence, the rural areas they now serve will be left in the dark, as MSOs traditionally have shown little interest in rural areas due to their limited profit potential. In recognition of the critical role played by small system operators, and given the fragile nature of such operations, the Commission should exempt small system operators entirely from burdensome rate regulation.

Respectfully submitted,

CONSORTIUM OF SMALL CABLE SYSTEM OPERATORS

By: 

Robert J. Rini
Stephen E. Coran
Steven A. Lancellotta

Rini & Coran, P.C.
1350 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
(202) 296-2007

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EXHIBIT 1

Atwood Cable Systems, Inc,

B&L Cable Communications, Inc.

Belhaven Cable TV, Inc.

Clear Vu Cable

Curtis Cable T.V. Co., Inc.

Fairmont Cable TV

Full Circle Communications, Inc.

Horizon Cable TV, Inc.

Midwest Video Electronics, Inc.

Panora Cooperative Cablevision

Pioneer Cable, Inc.

Rural Missouri Cable TV, Inc.

Southwest Missouri Cable TV, Inc.

Western Cabled Systems

CERTIFICATE OF SERVICE

I, Pamela Crocker, a secretary in the law office of Rini & Coran, P.C., hereby certify that I have on this 27th day of January, 1993, sent via hand delivery, a copy of the foregoing Comments to the following:

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Sherrie P. Marshall
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Ervin S. Duggan
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

John R. Winston
Office of Small Business Activities
Federal Communications Commission
1919 M Street, N.W.
Washington, d.C. 20554

Pamela J Crocker
Pamela Crocker

pc\com0125